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In the

Supreme Court of the United States

No. 502

RUSSELL H. SITTON, et ux,
Petitioners,

v.

AMERICAN TITLE COMPANY OF DALLAS, et al,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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The Respondents, American Title Company of Dallas, Katherine H. Brown and husband Jarvis Brown, Leonard Duckworth, Harry Clifton Sumner, Jr., Lawyer's Surety Corporation, and Mr. and Mrs. Walter J. Morman would respectfully show unto the Court that the Petition for Writ of Certiorari in the above cause should be denied.

LACK OF JURISDICTION

At Page 2 of Petitioners' Application for Writ of Certiorari, Petitioners submit that jurisdiction of this Court to entertain the writ is based upon 28 U.S.C. §1257 (3) and rely upon two areas to invoke such jurisdiction.

Respondents submit that the grounds set forth are without merit, and this Court does not have jurisdiction.

In inverse order, Petitioners state that the opinion of the Court of Civil Appeals "holds" that Petitioner Sitton is barred from recovery because of his supposed failure to apply to the Veteran's Administration for hardship relief, whcih "ruling" requires a construction of 38 U.S.C. §1870 (a) (4).

A careful review of the entire opinion written by the Court of Civil Appeals fails to reveal any "holding" or "ruling" to the effect claimed by Petitioners. The express ruling of the Court of Civil Appeals in this case is found at Page A-40 of the Petitioners' Application, in the second paragraph on that page. With no such "holding" or "ruling" as claimed by Petitioners, the second basis for invocation of this Court's jurisdiction, of necessity, falls.

Petitioners submit that they have been deprived of rights secured them by the Fourteenth Amendment to the Constitution of the United States. In the questions presented, Page 3 of Petitioners' Writ, and in the argument following, Petitioners assert the question to be one of application of the Seventh Amendment to the United States Constitution to the several states by virtue of the Fourteenth Amendment.

Petitioners say this Court has not rendered a decision directly concerning the application of the Seventh Amendment to the state courts for many years. (p. 18) Petitioners apparently overlooked the recent decisions of this Court, in 1947 and 1959, in the cases of *Fay v. New York*, 332 U.S. 261, and *Bartkus v. Illinois* 359 U. S. 121, where this Court again held that the Seventh Amendment of the Constitution is not made applicable to the several states by the Fourteenth Amendment. Petitioners claimed deprivation of rights under the Seventh Amendment by a state court would not invoke the jurisdiction of this honorable Court.

Under the same argument, Petitioners advance, in effect, the theory that the provisions of the Texas Rules of Civil Procedure for the granting of a judgment notwithstanding the jury's verdict, is violative of the due process clause of the Fourteenth Amendment. This theory has been foreclosed by this Court. *Walker v. Sauvinet* 92 U.S. 93. Here it was held that the requirement of the Fourteenth Amendment is met, if the trial is had according to the settled course of judicial proceedings, and that this process in the states is regulated by the law of the state. See also *White v. White* (Tex. Sup. Ct. 1917) 196 S.W. 508, 511.

The applicable rule of procedure, Rule 301, Texas Rules of Civil Procedure, formerly Article 2211 Vernon's Annotated Texas Statutes, has been held constitutional by the Courts of the State of Texas. *Johnson v. Moody* (Tex. Civ. App. 1937) 104 S.W. 2d 583, writ of error dismissed; *Sheppard*

v. City and County of Dallas Levee Improvement (Tex. Civ. App. 1937) 112 S.W. 2d 253, no writ history.

Therefore, Petitioners' Application for Writ of Certiorari should be in all things denied for want of jurisdiction.

COUNTERPOINTS TO QUESTIONS PRESENTED BY PETITIONERS

COUNTERPOINT ONE

(Replying to Petitioners' Question One)

Petitioner's Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO

(Replying to Petitioners' Question One)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT THREE

(Replying to Petitioners' Question One)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in this cause.

COUNTERPOINT FOUR

(Replying to Petitioners' Question Two)

Petitioners raise no constitutional question in their Question Number Two, in that such question inquires only whether the evidence in the cause raises a fact issue.

COUNTERPOINT FIVE

(Replying to Petitioners' Question Three)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Three, in that such question simply requests the Court to search the record in the Trial Court to see whether there was an absence of evidence to support the jury verdict and, if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

COUNTERPOINT SIX

(Replying to Petitioners' Question Four)

Petitioners, in their Question Number Four, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in this case.

COUNTERPOINTS ONE, TWO, AND THREE RESTATED

COUNTERPOINT ONE—(Restated)

(Replying to Petitioners' Question One)

Petitioner's Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO—(Restated)

(Replying to Petitioners' Question One)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT THREE—(Restated)

(Replying to Petitioners' Question One)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in this cause.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINTS ONE, TWO, AND THREE

Petitioner presents no issue in Question One or the argument thereunder within the jurisdiction of this Honorable Court. Question One, as presented, is merely a rhetorical statement; it amounts only to a request for an advisory

opinion. Petitioner makes no showing that this Court's answer to Question One would either grant or deny him relief, for he makes no showing that even if the Second Clause of the Seventh Amendment does apply to the state courts, the rights guaranteed thereunder were not extended to Petitioner. Petitioner makes no showing or argument that he did not receive a trial by jury in accordance with the stipulations of the Seventh Amendment to the United States Constitution.

Your Respondents would show, however, that the Second Clause of the Seventh Amendment does not apply to proceedings in state courts. Petitioner cites numerous cases holding that the First Clause of the Seventh Amendment does not apply to the states through the due process clause of the Fourteenth Amendment. Most of the cases cited by Petitioner hold either directly or by necessary implication, that the Second Clause of the Seventh Amendment does not apply to the states either. Because it is not mandatory for the states to provide trial by jury in civil causes, it must be held that if a state does provide trial by jury, it may also provide reasonable rules governing the process and procedure of such trial. The cases upholding this point are legion. See, for example, *Fay v. People of New York*, 332 U.S. 261 (1947). In that case, this Court stated:

> "[I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments would require jury trial in criminal and certain civil cases are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. This Court has ruled that consistently with those amendments,

> ' trial by jury may be modified by a state or abolished altogether.' *Palko v. State of Connecticut*, 302 U.S. 319 and cases there cited."

Conceivably, the trial procedure provided by a state court could violate due process of law. Such is not the case at bar, nor is it the proposition raised by Petitioners. Petitioners would have this Court hold that all judgments non obstante veredicto are ab initio unconstitutional.

Such a holding would require the Courts and legislatures of every state of the Union to alter their rules of judicial procedure. Moreover, such a holding would violate Rule 50b of the *Federal Rules of Civil Procedure*. Rule 301 of the *Texas Rules of Civil Procedure* is similar to Rule 50b of the *Federal Rules of Civil Procedure*. Rule 301 provides that judgment non obstante veredicto may be granted only if a directed verdict would have been proper. This rule has been construed much the same as Rule 50b, in that judgment non obstante veredicto may be entered only when, from the facts, there is no evidence of probative force in favor of the judgment. Under Rule 301, judgment non obstante veredicto may be entered only when, from the evidence, reasonable minds could not differ on the result. That rule was observed and followed in the case at bar. The trial judge, the Honorable Court of Civil Appeals for the Fifth Judicial District of Texas, and the Honorable Supreme Court of Texas, by its refusal to hear Petitioners' Writ of Error, have held that there is no evidence to support the verdict that was rendered upon the trial of this cause. The Petitioners produced no evidence of any probative force to sustain the allegation of their petition.

COUNTERPOINTS FOUR AND FIVE RESTATED

COUNTERPOINT FOUR—(Restated)

(Replying to Petitioners' Question Two)

Petitioners raise no constitutional question in their Question Number Two, in that such question inquires only whether the evidence in the cause raises a fact issue.

COUNTERPOINT FIVE—(Restated)

(Replying to Petitioners' Question Three)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Three, in that such question simply requests the Court to search the record in the Trial Court to see whether there was an absence of evidence to support the jury verdict and, if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINTS FOUR AND FIVE

Petitioners' Questions Two and Three simply ask the Court to weigh the evidence in this case. It has been held in the following cases that a Writ of Certiorari will not be granted to review evidence: *General Talking Pictures Corp. v. Western Electric Company*, 58 S. Ct. 849, 59 S. Ct. 116, 59 S. Ct. 355. *U.S. v. Johnston*, 45 S. Ct. 496. Thus, this Honorable Court would not grant a Writ of Certiorari to review a decree on the ground that the evidence was not

sufficient to establish actual dedication of Petitioners' property to public use. *Southern Power Company v. North Carolina Public Service Company*, 44 S. Ct. 164.

While this Court can review a decision of a state court on a question pertaining to evidence where a federal question is otherwise involved, it does not have jurisdiction to determine sufficiency of evidence absent the federal question. *Whitney v. People of State of California*, 47 S. Ct. 641. *Van Oster v. State of Kansas*, 47 S. Ct. 133.

Where the lower court has found that there was no evidence on a certain issue, the rule is that if, in fact, there is no such evidence, or if the evidence is conflicting, the Supreme Court of the United States can inquire no further. Only if the uncontradicted evidence affirmatively establishes the facts contrary to the finding can this Court ignore that finding. *Baltimore and O.S.W.R. Co. v. Burtch*, 44 S. Ct. 165.

COUNTERPOINT SIX—(Restated)

(Replying to Petitioners' Question Four)

Petitioners, in their Question Number Four, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in this case.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINT SIX

The Texas Court of Civil Appeals did not hold that a failure to seek relief under the hardship provisions of the applicable statute barred a veteran from seeking relief from third parties. The Court, in referring to the letters from the Veteran's Administration concerning a waiver of Petitioners' indebtedness was dealing with the question of causation. The Petitioners, having alleged that their injuries flowed from the act of the alteration of the deed, the Court of Civil Appeals was simply pointing out that the harassment which had occurred by the Veteran's Administration might not have occurred had Petitioners sought the remedy available to them. So the Court said, "Under these circumstances can the Appellants' injuries properly be said to have 'naturally flowed' from the alteration of the deed? Were they 'directly or immediately caused by the wrongful act'? We think each of these questions must be answered in the negative."

Thus, there was no holding that failure to apply for relief to the Veteran's Administration barred an action against the third party. All the Court was saying was that in proving causation Petitioners had to show that the injuries sustained by them were direct and immediate consequences of the act of the Respondents. And the Court was pointing out that the chain of causation was broken.

CONCLUSION

WHEREFORE, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

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